86-352

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN ELWOOD KRZYSKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the bail conditions imposed pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3142 *et seq.*, requiring defendant to file certain federal income tax returns and pay any and all taxes due based on said returns are conditions authorized by said Act and are conditions that protect the safety of any individual or the community where the District Court has determined that defendant is not likely to flee the jurisdiction pending appeal of the conviction for failure to file tax returns.

LIST OF PARTIES

The parties to the proceedings below were the petitioner-defendant Kevin Elwood Krzyske and the respondent-plaintiff the United States of America, represented by Joel M. Shere, United States Attorney, and Karen Reynolds, Assistant United States Attorney.

The respondents before this Court include the Solicitor General and Joel M. Shere, United States Attorney.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Kevin Elwood Krzyske respectfully prays that a writ of certiorari issue to review the orders and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceedings on June 13, 1986 and May 1, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reprinted in the appendix hereto, pp. A3, A8, *infra.*

The memorandum decision of the United States District Court for the Eastern District of Michigan, Southern Division (Joiner, D.J.) is reprinted in the appendix hereto, pp. A1, A6, A10, *infra*.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on June 13, 1986 affirming conditions to bail pending appeal requiring defendant to file certain tax returns and to pay any and all taxes due thereon imposed by the United States District Court, Eastern District of Michigan, Southern Division pursuant to the Bail Reform Act of 1984 (18 U.S.C. section 3143).

Petitioner moved the District Court for an order staying enforcement of the bail conditions imposed on May 23, 1986 pending his filing of a petition for certiorari which was granted on June 17, 1986 but vacated on June 26, 1986 upon respondent's motion for rehearing.

The jurisdiction of this Court to review the order of the Sixth Circuit affirming the "file and pay" conditions imposed by the District Court is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

18 U.S.C. sections 3143(b) and 3142(b), (c). Release and detention pending judicial proceedings (Bail Reform Act of 1984).

STATEMENT OF THE CASE

Petitioner was charged by indictment with five counts of income tax evasion, four counts of failure to file individual income tax returns and one count of filing a false withholding exemption certificate.

Petitioner was convicted on four counts of failure to file individual income tax returns and one count of filing a false withholding exemption certificate. He was acquitted on all counts of income tax evasion. For appeal, petitioner retained counsel who sought release pending disposition of the appeal. The Trial Court granted release subject to the conditions that: 1) defendant not communicate with anyone but his attorney; 2) defendant file certain U.S. individual tax returns; and 3) defendant pay all taxes due under the returns filed at the time of filing. Defendant was given 10 days with which to comply (p. A1 order of September 17, 1985) by filing eight Federal Income Tax Returns for the years 1978 to 1984.

Petitioner appealed the order of the district court and moved the United States Court of Appeal, for the Sixth Circuit to eliminate the conditions of release and to continue bond pending appeal. Upon consideration of the matter by Circuit Judges Merritt, Jones and Krupansky, the court found that the condition that allowed plaintiff to communicate only with his attorney regarding beliefs and practices relating to income taxes amounted to an unconstitutional prior restraint in violation of petitioner's First Amendment rights under the U.S. Constitution. The motion to eliminate other conditions to release was denied and the motion to continue bond was granted in its order of May 1, 1986.

In the order from the district court entered May 23, 1986, upon its own motion, petitioner was directed to comply with the remaining conditions to release pending appeal by June 15, 1986 or report to the U.S. Marshal's office in Detroit, Michigan on or before June 20, 1986 at 2:00 p.m.

Subsequently, petitioner moved the Circuit Court for clarification of May 1, 1986 and to stay or reverse the district court's order of May 23, 1986. The court amended its May 1, 1986 order by including the language that "It is ORDERED that defendant's motion for continuation of bond pending appeal is granted provided that he files tax returns for 1978-1984 within the time required by the district court and provided that all past due taxes are paid by the Plaintiff at the time the returns are filed." (Order of June 13, 1986 6th Cir.).

Petitioner thereafter filed an Application for Emergency Stay Pending Petition for Certiorari with the U.S. Supreme Court on June 25, 1986. That application was denied on June 27, 1986 and petitioner surrendered himself into custody where he remains at the present time.

From the time of the arraignment, on April 17, 1985, petitioner proceeded *pro se.* He is a high school graduate, has received no formal legal education, has worked for the past several years in a hardware and lumber company, and was 29 years old at the arraignment.

Magistrate Paul J. Komives instructed the petitioner at the arraignment as to his right to counsel. At that time, petitioner stated on questioning that he did not desire a court appointed attorney and that the only other judicial proceeding he had ever been involved in was for possession of a radar detector in his car (Arraignment, Wednesday, April 17, 1985, pp. A12-A18). He stated further that

he had never retained counsel on that or any other occasion. (*Id.*). Magistrate Komives accepted this as a waiver of petitioner's right to counsel for the arraignment proceedings and instructed petitioner as to his right to counsel in subsequent proceedings. (*Id.*). The record reflects petitioner's statement of his intent to obtain counsel in future proceedings. (*Id.* at p. A13).

Subsequent to the reading of the indictment by the Magistrate, petitioner submitted information to Pretrial Services upon his instruction from the bench that such information would not constitute waiver of the confidentiality of such information. (*Id.* at A17). Pursuant to the recommendation of Pretrial Services, petitioner was released on $25,000.00 unsecured bond. The Assistant United States Attorney did not oppose. (*Id.* at A23).

Petitioner requested instructions from the bench regarding his right to counsel again during pretrial motions before Magistrate Steven Pepe on May 13, 1985. Petitioner moved the court to be allowed by counsel of choice. The Magistrate informed the petitioner of licensing requirements relative to practice before the federal district court. Petitioner, based on that information stated that he continued to seek licensed counsel (Pretrial Motions, May 13, 1985, pp. A19-A30). Petitioner requested a referral to competent attorneys. (*Id.* at A21). Petitioner further noted that he might not be financially able to afford counsel. (*Id.*). He stated for the record his concern about possible waiver that might result from furnishing financial information for court appointed counsel. (*Id.*). Magistrate Pepe did not state whether such information would be held confidential and denied petitioner's motion for unlicensed counsel or co-counsel of choice without prejudice to petitioner's seeking court appointed counsel or obtaining licensed counsel. (*Id.*).

Petitioner made timely appeal of Magistrate Pepe's adverse decision to District Judge Joiner who denied the motion on June 10, 1985. Four days later on June 14, 1985, petitioner appeared before Judge Joiner and stated that he was not ready to proceed. (Proceedings before Judge Charles W. Joiner, June 14, 1985, pp. A25-A30). Petitioner offered to state what efforts he made to seek appropriate counsel and stated that he could not afford counsel at that time. (*Id.* at A27). The court proceeded to jury selection however without inquiry into the circumstances of petitioner's failure to file a financial affidavit of indigency.

Based upon the directions from the bench, petitioner proceeded to trial *pro se*. Assistant United States Attorney Karen Reynolds noted on record that petitioner requested counsel prior to jury selection. (A29). The court responded as if petitioner voluntarily waived right to counsel with full knowledge.

On June 28, 1985 the petitioner appeared in court while the jury was involved in deliberation. Following additional court instructions, the jury rendered a verdict on that date. The judge ordered the petitioner to appear on August 19, 1985 for sentencing and during that time he was released on bail on a personal bond at the recommendation of the United States Attorney. At that time, there was no assertion by the prosecuting attorney or the court that the petitioner was likely to flee the jurisdiction or present a danger to himself or any other person in the community.

On September 9, 1985 the petitioner appeared before the court for sentencing. Following sentencing the petitioner was released on personal bond and no assertion was made by the court or the prosecuting attorney that the petitioner was a danger to himself or any other person

or was likely to flee the jurisdiction. In fact, the prosecuting attorney reported that the petitioner appeared at every proceeding prior to that date.

On September 17, 1985 arguing petitioner's motion for bail pending appeal, the prosecuting attorney clearly admitted that there was "probably no flight risk because the defendant had appeared for every court proceeding and that there may not be a danger to the community." The prosecuting attorney did raise for the first time, however, the possibility that the petitioner might by possible association be a danger to the community. She stated, "that, in fact, the tax protest movement, although Mr. Krzyske, we cannot show, has been involved in dangerous activities, the tax protest movement in this country itself, has in fact taken on violent proportions in several instances."

"Where we have no evidence that Mr. Krzyske is in fact, involved in that, he is involved in a movement that has a history of violence". No organizations or incidents were asserted by the prosecutor.

REASONS FOR GRANTING THE WRIT

THE CONDITIONS ARE NOT PROPER UNDER THE BAIL REFORM ACT OF 1984

Conditions to post conviction bail requiring petitioner to file Individual Federal Income Tax Returns and to pay the taxes due thereon are not proper because they arise from a failure of the district court to give effect to the Bail Reform Act of 1984 consistent with current interpretation and such conditions have no effect on the peti-

tioner's likelihood to flee or his possible danger to himself or others. These conditions to bail also constitute excessive bail under the Eighth Amendment and are in violation of the defendant's rights under the Fifth Amendment to the United States Constitution.

The Bail Reform Act of 1984 did not eliminate the allowance of release of defendants pending appeal of convictions, however, it placed the burden of proof of entitlement to release on the defendant, eliminating the presumption in favor of release.[1]

The Act states that

> The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds
>
> 1. by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and
>
> 2. that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial
>
> If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

In the matter *sub judice* the court found that: 1) plaintiff was not likely to flee the jurisdiction; 2) that there was substantial questions of law meritorious of appeal based on defense counsel's assertions; and 3) that the safe-

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[1] Senate Report No. 225, 98th Cong., 1st Sess. 26, reprinted in 1984, U.S. Code Cong. & Ad. News 3182; see also *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985).

ty of others and the community *could* be affected by the defendant's conduct if defendant did not comply with tax laws. Petitioner was ordered to refrain from communicating with anyone other than his attorney regarding his beliefs about the income tax system throughout the period of the pending appeal and petitioner was ordered to file certain tax returns and to pay all taxes due thereon. (See Bail Order of September 17, 1985, District Judge Joiner.) This order was modified by the Circuit Court which struck the "refrain from communicating" provision as an unconstitutional prior restraint but upheld the remaining conditions requiring petitioner to file and pay. See the Circuit Court Orders of May 1, 1986 and June 13, 1986. For the following reasons, the Circuit Court erred in affirming the district court's bail order.

INTERPRETATION OF § 3143(b)

Since the Act became effective on October 12, 1984, district courts have struggled with the interpretation and application of its provisions.[2] The circuit courts of the Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits follow an interpretation establishing a test[3] requiring the

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[2] See *United States v. Handy*, 753 F.2d 1487, 1489 (9th Cir. 1985), *modified*, 761 F.2d 1279, 1280 (9th Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985); *United States v. Miller*, 753 F.2d 19 (3rd Cir. 1985). See also *The Federal Bail Reform Act of 1984: The First Wave of Case Law*, 39 Arkansas Law Review 169 (1985).

[3] See *United States v. Randall*, 761 F.2d 122, 124-25 (2nd Cir. 1985); *United States v. Miller*, 753 F.2d 19 (3rd Cir. 1985); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024-25 (5th Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1231-34 (8th Cir. 1985); *United States v. Handy*, 753 F.2d 1487, 1489 (9th Cir. 1985), modified, 761 F.2d 1279, 1280 (9th Cir. 1985); *United States v. Affleck*, 765 F.2d 944, 952-53 (10th Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985).

convicted defendant to show by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or the community if released under § 3143(b)(1); and that he has established under § 3143(b)(2) by an ordinary preponderance of the evidence that the appeal is not for delay. Additionally, the defendant must establish: 1) that the appeal raises a substantial question of law or fact; and 2) that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.[4]

In the petitioner's case the district court did not apply the statute as interpreted by the courts relative to the evaluation of substantial issues likely to result in reversal or a new trial, erred in imposing conditions to release that are excessive in light of the record demonstrating petitioner's qualifications for release and in setting conditions not reasonably related to assuring the appearance of petitioner or insuring the safety of individuals and the community.

As petitioner was found not likely to flee it was the next task of the court to evaluate the danger to others imposed by release of petitioner pending appeal.

Danger to others generally is placed in the context of physical danger. See *United States v. Catala Fronfrias*, 612 F.Supp. 999 (D.C. Puerto Rico 1985) (Defendants convicted of murder of a witness); *United States v. Ignoffo*, 602 F.Supp. 1027 (D.C. Ill. 1985) (Evidence that defendant was accompanied by individual who committed gangland-type assassination).

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[4] *United States v. Affleck, supra.* See also *United States v. Miller* and *United States v. Giancola, supra.*

The record reflects no accusation that petitioner's views or activities incited others to lawlessness while he was released pending trial or sentencing. In fact the record fails to support any allegation that petitioner ever posed a threat to anyone. Indeed, the conditions of the court that petitioner file certain individual income tax returns and pay any and all taxes thereon is not a justified condition of bail.

The record clearly shows that the petitioner was never considered likely to flee at any time. The record also clearly showed that he was not considered a danger to himself or the community or any other person either prior to the trial, during the trial, subsequent to his conviction and prior to his sentencing or subsequent to his sentencing until motions for bail pending appeal were considered. Only at that time did the prosecuting attorney raise a remote guilt by association of the petitioner to the tax protest movement. The prosecuting attorney at that time also admitted that there was no evidence that the petitioner had ever been violent, had ever threatened violence or was involved in groups that had advocated violence or participated in violent activities. Argumentatively even if the petitioner was violent or a danger to the community, the filing of income tax returns and the payment of income taxes would have no conceivable effect on such potential violence and could not even be publicized to the general public because of the Privacy Act except by the petitioner. Further, the filing of the petitioner's tax returns and payment of income taxes would have no effect whatsoever on petitioner's ability to enmesh others in a tax protest activity (even if such activity were proved or alleged which is not the case here).

In other words, no specific allegations that petitioner was a danger to the community were ever made nor were

they even alluded to until many weeks after his conviction. Clearly this indicates an attempt to apply completely unsubstantiated innuendo as evidence of danger to a community. Petitioner does not have the burden to overcome this type of allegation when the prosecution has stated otherwise on many occasions.

While the 1984 Act changed the presumption in favor of bail, it did not expressly affect prior law affecting proper conditions. Release has been authorized subject to such requirements as *inter alia* remaining under the supervision of another, maintaining employment or education; abiding by restrictions on associations, complying with a curfew. See 18 U.S.C. § 3142(c). The filing of tax returns and payment of taxes fulfills no such objective as expressed by the Act.

Additionally, the order violates petitioner's Fourth and Fifth Amendment rights against search and seizure as such information contained therein is obtained *under oath* and addresses or admits alleged crimes in the indictment in question. Such a requirement also is a determination of tax liability that yet has not been made. Third, such conditions do not further the purpose of the Bail Reform Act which is to deny bail where a defendant is likely to flee or endanger others, if released. Finally, as discussed *infra*, the imposition of a condition to bail requiring the filing of returns and payment of taxes amounts to a violation of the Eighth Amendment prohibition against excessive bail once it is found that a defendant is entitled to bail.[5]

Under the current majority interpretation of § 3143(b), petitioner has the burden to prove entitlement to release pending appeal. See *United States v. Powell*, 761 F.2d

[5] See *United States v. Giangrosso*, 763 F.2d 849 (7th Cir. 1985).

1227, 1234 (8th Cir. 1985). The two prong test requires that the district court evaluate the merit of the appeal in terms of 1) substantial issue of law or fact and 2) likelihood of success. *United States v. Miller*, 753 F.2d 19 (3rd Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985).

The circuit court affirmed the district court's finding that

> The court can see nothing meritorious in defendant's appeal. However, since counsel for the defendant indicates that she believes that there are substantial grounds for appeal, based on that assertion alone, the court finds that there are substantial questions of law meritorious of appeal . . .

Order of Judge Joiner, September 17, 1985. In affirming such a finding, the circuit court has erred in not protecting the due process right of the accused to release pending appeal by requiring a clear record to resolve whether petitioner is entitled to bail pending appeal under the Act. See *United States v. Kowalik*, 765 F.2d 944, 954 (10th Cir. 1985). It has been held that such error is cause for remand for such hearings and reconsideration of denial of bail. (*Id.*).

There has been some controversy at the district court level regarding the meaning of "substantial issue".[6] The Third Circuit defined such an issue as "one which is either novel, which has not been decided by controlling precedent or which is fairly doubtful". *United States v. Miller*, 753 F.2d 19, 23 (3rd Cir. 1985). As noted by the court, "this represents a marked change in the inquiries into the merits in the context of a bail determination, since the

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[6] See *The Federal Bail Reform Act of 1984: The First Wave of Case Law*, 39 Arkansas Law Review 169, 222 (1985).

[Bail Reform Act] 1966 Act only required the court to determine whether the issue was 'frivolous' ". *Id.*, see 18 U.S.C. Section 3148 (repealed October 12, 1984).

The Ninth Circuit defined the term as "fairly debatable" relying on the United States Supreme Court's pronouncement in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985). The circuit court also described such an issue as one "of more substance than would be necessary to a finding that it was not frivolous". *Id.* at 1283, citing *United States v. Giancola*, 754 F.2d at 901; *Barefoot v. Estelle*, 103 S.Ct. at 3394; *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977).

Petitioner's appeal is principally based upon the denial of the fundamental constitutional right to counsel in criminal adversary proceedings. Petitioner clearly requested counsel before jury selection and requested instructions from the bench regarding his right to private licensed counsel, and his right to court appointed counsel. The question then to be examined by the district court is whether such a denial is a substantial question.

The circuit court upheld the district court's equivocal finding of a substantial issue based upon unspecified arguments of counsel. Such an order is violative of the Act as it fails to make a critical independent finding to establish a clear record for review.

The second prong of the test requires the evaluation of the likelihood of success of an appeal. See *United States v. Miller*, 753 F.2d at 23-24. This test does not require the district court to find error in its own opinion or assess the ultimate probability that a defendant will obtain reversal. *Id.*, *United States v. Powell*, 761 F.2d 1227 (8th Cir. 1985). Rather it has been found that defendants must

show only that if the issue is decided in his favor, the result more probably than not would be reversal or a new trial. *Id.* at 1233.

The record demonstrates that there is an inference from the proceedings that petitioner made no clear waiver of right to counsel before trial. See *United States v. Lorick*, 753 F.2d 1295, *cert. denied*, 105 S.Ct. 2342, 85 L.Ed.2d 857 (4th Cir. 1985). Petitioner is entitled to proceed *pro se* if such a decision is made knowingly, intelligently and voluntarily. *United States v. Hoffman*, 733 F.2d 596 (9th Cir. 1984). Here, the petitioner sought counsel in good faith and proceeded on advice from the bench. The district court failed to establish in the record that petitioner made his choices knowingly. See *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). For the reasons discussed the procedure affirmed by the circuit court is in conflict with the procedure required under the Bail Reform Act of 1984 and is *contra* to interpretation of the Act in the majority of circuits.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Petitioner notes that the issue of right to counsel is presented only to demonstrate the nature and circumstances of his appeal to the Sixth Circuit. If petitioner is correct in asserting that the District Court failed to apply the proper legal standard in its bail order, which was affirmed by the Sixth Circuit, that order should be

vacated and petitioner's release on $25,000.00 personal bond should be ordered.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN ELWOOD KRZYSKE,

Defendant.

Criminal Action No. 85CR-90010-AA
HONORABLE CHARLES W. JOINER

ORDER

This matter comes before the court on defendant's motion for bond pending appeal. For the reasons stated herein, the defendant's motion is conditionally granted.

Pursuant to 18 U.S.C. § 1343(b) the court finds that:

1. It is not likely that the defendant will flee if he is allowed to remain on bond pending his appeal;

2. The court can see nothing meritorious in the defendant's appeal. However, since counsel for the defendant indicates that she believes that there are substantial grounds for appeal, based on that assertion alone, the court finds that there are substantial questions of law meritorious of an appeal; and

3. The safety of others, and of the community, could be affected by the defendant's conduct during the time he is awaiting his appeal. If the defendant is left at liberty, does not comply with the tax laws, and continues to argue for his beliefs and doctrines regarding the income tax sys-

tem, others may become enmeshed in similar problems, subjecting themselves to prosecution.

Therefore, the defendant's motion for bond pending appeal will be granted subject to conditions. These conditions are that:

1. The defendant refrain from communicating with anyone other than his attorney during this appeal regarding his beliefs about income taxes, refusal to pay income taxes, and refusal to file income tax returns, throughout the entire period that his appeal is pending;

2. The defendant file proper income tax returns within ten days of the date of this order for each year from 1978 to the present. These forms must meet the requirements of the Internal Revenue Code and its regulations, as interpreted by the Internal Revenue Service. This means they must show total income, including income from wages; and

3. The defendant must pay past due taxes at the time the returns are filed.

If the defendant certifies on oath that he will comply with condition No. 1 above, the Internal Revenue Service certifies that he has complied with conditions Nos. 2 and 3 (by accepting his returns as accurate), he may remain at liberty during the pendency of his appeal. If, however, he either fails, or refuses, to comply with any of the above conditions, then defendant's motion for bond pending appeal is denied.

SO ORDERED.

/s/ CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: 9/17/85
Ann Arbor, Michigan

No. 85-1760

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Kevin Elwood Krzyske,

Defendant-Appellant.

ORDER

Before: MERRITT, JONES, and KRUPANSKY, Circuit Judges.

Defendant moves to eliminate conditions of release set by the trial court and to continue bond pending appeal. The government moves for revocation of bond pending appeal and responds to defendant's motion. Defendant has filed a reply to the government's motion for revocation of bond and a supplemental brief in support of his motion.

Defendant was convicted of one count of income tax evasion and four counts of willfully failing to file federal tax returns in violation of 26 U.S.C. §§ 7201 and 7203 respectively. He was sentenced to five years imprisonment and fined $10,000 on the tax evasion count and to one year imprisonment on each of the four counts of failing to file federal tax returns and fined $10,000. The sentences for the failure to file income tax returns were to run consecutive to each other and concurrent to the term for the tax evasion conviction. Defendant was to begin serving

his sentence on October 1, 1985. On September 17, 1985, the defendant moved the trial court for bail pending appeal.

Pursuant to 18 U.S.C. § 3143, the trial court found that defendant was not likely to flee, but that defendant could pose a danger to the community if he fails to comply with the tax laws because others will become enmeshed in similar problems subjecting themselves to prosecution. The court also found that there was no merit to defendant's appeal, but based solely on defense counsel's assertions, there were substantial questions raised. The court granted defendant's motion for bail subject to the following conditions: 1) defendant could communicate only with his attorney regarding his beliefs about income taxes, his refusal to pay same, and his refusal to file income tax returns throughout the entire period that his appeal is pending; 2) defendant was to file tax returns for 1978-84 within ten days of the order granting bail and the returns had to be proper within the meaning of the code and regulations; and 3) past due taxes had to be paid by defendant at the time the returns were filed. If defendant failed to comply with the conditions, the court's order provided for revocation of bond pending appeal.

Defendant appealed and moved this Court to eliminate the conditions of release and to continue bond pending appeal. On September 27, 1985, Judge Jones granted a temporary stay of the conditions of release imposed by the district court pending consideration of this matter by a regular three judge motions panel.

Upon consideration, it is ORDERED that the condition of bail, which allowed defendant to communicate only with his attorney regarding his beliefs and practices relating to income taxes pending appeal of his case, is eliminated as it constitutes a prior restraint in violation of the First Amendment to the Constitution. *Near v. Minnesota*, 238 U.S. 697 (1931).

The motion to eliminate the remaining conditions of release is ORDERED denied. It is also ORDERED that the motion for continuation of bond pending appeal is granted. Further, it is ORDERED that the government's motion for revocation of bond is referred to the panel that will hear the case on the merits.

ENTERED BY ORDER OF THE COURT

_____

Clerk

[Filed May 1, 1985]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN ELWOOD KRZYSKE,

Defendant.

Criminal Action No. 85CR-90010-AA
HONORABLE CHARLES W. JOINER

ORDER

Upon the court's own motion, the court finds that on September 9, 1985, the defendant was sentenced to a five year term of imprisonment. On September 17, 1985, this court granted the defendant's motion for bond pending appeal with certain conditions of bond set by the court. The defendant appealed this order and moved the Court of Appeals to eliminate the conditions of bond set by this court. On May 1, 1986, the Court of Appeals eliminated the condition of the bond preventing communication with others but denied the defendant's motion to eliminate the conditions of his appeal bond relating to the payment of back taxes and the filing of his income tax returns.

Therefore, it is hereby ordered that the defendant Kevin Elwood Krzyske report to the United States Marshal's office in Detroit, Michigan, on or about June 20, 1986 at 2:00 p.m., unless by June 15, 1986 he has complied with the provisions of the order of September 17, 1985, at-

tached hereto, relating to the payment of back taxes and the filing of income tax returns. If he does so comply with the designated provision of the order of September 17, 1985, this order to report will be held for naught. If he does report to the Marshal's office as indicated in this order, bond will be cancelled.

SO ORDERED.

/s/ CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: May 23, 1986
Ann Arbor, Michigan

Nos. 85-1760, 1799

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Kevin Elwood Krzyske,

Defendant-Appellant.

ORDER

Defendant moves the Court to clarify a May 1, 1986 order and to stay or reverse the district court's order entered May 23, 1986.

On May 1, 1986 this Court ordered that: the motion to eliminate the condition of bail, which allowed defendant to communicate only with his attorney regarding his beliefs and practices relating to income taxes pending appeal, be granted; the motion to eliminate the remaining conditions of release be denied; and the motion for continuation of bond pending appeal be granted. Subsequently, the district court ordered defendant to file certain tax returns and to pay all past due taxes by June 15, 1986 or report to the U.S. Marshal's Office by 2:00 p.m. on June 20, 1986.

Defendant claims that the district court's order conflicts with this Court's May 1 order which granted him unconditional bond. Obviously, defendant misunderstood this court's prior order that declined to eliminate the conditions of release imposed by the district court requiring

him to file tax returns for 1978-84, which comply with the code and regulations, within ten days of the order granting bond and to pay past due taxes at the time the returns are filed.

It is, therefore, ORDERED that this Court's May 1, 1986 order is clarified to include the following language: "It is ORDERED that defendant's motion for continuation of bond pending appeal is granted provided that he files tax returns for 1978-84 within the time required by the district court and provided that all past due taxes are paid by the defendant at the time the returns are filed."

It is also ORDERED that the motion to stay or reverse the district court's order entered May 23, 1986 is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

[Filed June 13, 1986]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN ELWOOD KRZYSKE,

Defendant.

Criminal Action No. 85CR-90010-AA
HONORABLE CHARLES W. JOINER

ORDER

This matter comes before the court on defendant's motion to accept remaining conditions of bond pending appeal with financial modification. For the reasons stated more fully in open court on July 10, 1986, the court finds as follows pursuant to 18 U.S.C. § 1343(b):

1. The defendant does not raise any meritorious issues on appeal.

2. The defendant does pose a danger to the community if he is released.

3. The defendant has failed to comply with the special conditions of this court's order of September 17, 1985 that he file all past due tax returns and pay all past due taxes.

It is ordered that the defendant's motion to accept remaining conditions of bond pending appeal with financial

modification is DENIED and the defendant is ordered to remain in the custody of the Attorney General.

SO ORDERED.

/s/ CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: July 10, 1986
Ann Arbor, Michigan

[1] * UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN ELWOOD KRZYSKE,

Defendant.

Case No. 85-900100
Detroit, Michigan
Monday, April 17, 1985
Judge Joiner

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[2] Detroit, Michigan
Wednesday, April 17, 1985
Afternoon Session

THE COURT: The United States versus Kevin Elwood Krzyske; is that how it's pronounced?

THE DEFENDANT: Krzyske.

THE COURT: Krzyske, excuse me. It's criminal number 85-90010, and Mr. Krzyske is before the Court at this time for arraignment on the indictment. Mr. Lynn Helland, Assistant United States Attorney, is present for the Government.

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* Numbers in brackets refer to the original pagination of the Official Court Reporter.

Let me repeat again, then; have you received a copy of the indictment?

THE DEFENDANT: I have just received it now, yes.

THE COURT: Uh-huh. Do you understand, sir, that you have a right not to make any statements about the case, and that if you make any statements, whatever you say could be used against you later as evidence in this case?

THE DEFENDANT: Yes, I understand that, your Honor.

THE COURT: Do you understand also that you have the right to have an attorney, a lawyer, to assist you in this case, to represent you, and to give you legal advice concerning this case?

THE DEFENDANT: I understand that, your Honor.

[3] THE COURT: Do you understand that you have the right to have an attorney, even if you cannot afford to hire counsel, and that if you therefore wish to request Court appointed counsel and satisfy the Court that you are unable to hire counsel yourself, that the Court would appoint a lawyer for you?

THE DEFENDANT: I understand that.

THE COURT: And at this time are you desirous of having an attorney or of asking the Court to appoint counsel for you or of proceeding without an attorney?

THE DEFENDANT: At this time I wish to proceed without an attorney. In the near future I plan on obtaining my own private counsel.

THE COURT: All right. So you are not at this time then asking the Court to appoint a lawyer for you?

THE DEFENDANT: That is correct.

THE COURT: Do you fully understand in your own mind your right to have an attorney?

THE DEFENDANT: Yes, I do.

THE COURT: And do you have any questions with regard to that right?

THE DEFENDANT: No.

THE COURT: Okay. Would you be willing to tell me what is your educational background, sir?

THE DEFENDANT: My educational background is a high [4] school graduate.

THE COURT: All right. And how old are you at this time?

THE DEFENDANT: Twenty-nine.

THE COURT: And have you been employed at any sort of job in the past several years?

THE DEFENDANT: Yes, I—I have not been employed. See, I have trouble with the word employ.

THE COURT: All right.

THE DEFENDANT: I'd rather say I work for.

THE COURT: All right. What sort of work do—

THE DEFENDANT: I work for a lumber yard and hardware.

THE COURT: Okay.

THE DEFENDANT: The name of it is Krzyske Brothers Company.

THE COURT: Okay.

THE DEFENDANT: They are located in Waltz, Michigan.

THE COURT: You don't have to answer this question if you don't wish to, but have you ever been involved in a criminal matter before as a defendant?

THE DEFENDANT: Yes. One time I was—

THE COURT: The reason I ask that question is I would like to know if you had an attorney on any prior occasion— [5] THE DEFENDANT: No.

THE COURT: —on a criminal matter.

THE DEFENDANT: No. One time I was in front of a judge for holding or having a radar detector in my car.

THE COURT: I see.

THE DEFENDANT: That's the only thing. And later on that law was unconstitutional.

THE COURT: Have you ever had the assistance of an attorney in any matter, either criminal or civil?

THE DEFENDANT: Not in any proceedings, your Honor, no.

THE COURT: All right. Have you ever talked to a lawyer?

THE DEFENDANT: Yes.

THE COURT: Okay. Well, it appears to me that you understand the nature of the proceedings, sir, and that you are a reasonably intelligent person, and therefore I assume that your declination at this time to ask for an attorney to be appointed is an intelligent decision on your part, although I frankly have my doubts myself as to whether it's a wise decision. But I understand you have the right to proceed without an attorney if you wish to do so at this time, and I believe you have waived your right to have counsel appointed for you at this time. If you wish to have counsel appointed for you at some later time, you can make a request to the [6] Court on that occasion.

Do you wish me to read into the record all nine pages of this indictment, sir, or are you prepared to waive the formal reading of the indictment at this time?

THE DEFENDANT: I would like you to read it for me, please.

THE COURT: All right. It reads as follows:

United States of America, Plaintiff, versus Kevin Elwood Krzyske, Defendant, criminal number 85-90010.

Violation 26 USC 7201, 7205, and 7203. Indictment.

The grand jury charges:

Count One: 26 USC 7201, income tax evasion. That on or about the 10th day of November 1980, in the Eastern District of Michigan, Southern Division, Kevin Elwood Krzyske, Defendant herein, who was a resident of the City of Carlton, State of Michigan, did wilfully and know-

ingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1978 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Michigan, a false and fraudulent income tax return, which was filed with the Internal Revenue Service, wherein he states that his taxable income for said calendar year was the sum of $384.40, and that there was no tax due and owing on that sum.

* * *

[16] concern that he's indicating a refusal to cooperate in the Court's attempts to get him in at a future date. We recommend that he be detained.

THE COURT: Well, you're asking for a detention hearing citing a risk of flight?

MR. HELLAND: That's correct.

THE COURT: Mr. Krzyske, do you have anything to say before I decide whether to hold you—have you held by the marshal and brought back for a detention hearing within the next day or so? This is with regard to bail.

THE DEFENDANT: I am not a risk to plea—or excuse me, to flee. I am not a violent person. I have not had any charges like this brought before me—against me before this time.

THE COURT: Okay.

THE DEFENDANT: I cannot understand why I would have to be held on my own recognizance because—I just can't understand.

THE COURT: Well, I'll have to have some sort of a report from Pretrial Services upon which to base a bail recommendation. So the report I have at this time says you decline to be interviewed by them to furnish them the information about your background so that they could

make a recommendation to me as to what would be reasonable bail.

So are you prepared to be interviewed by the [17] pretrial officer and to furnish background information for that purpose?

THE DEFENDANT: My fear, your Honor, of supplying information to the, to that person is possible waiving jurisdiction, and having the Court jurisdiction or granting the Court jurisdiction. In my opinion—

THE COURT: Anything you say to the Pretrial officer would be confidential and would not be made available to the U.S. Attorney for trial purposes.

THE DEFENDANT: I understand that, your Honor.

THE COURT: Are you prepared to talk to the Pretrial officer?

THE DEFENDANT: I would have to ask some questions first, your Honor.

THE COURT: Of the Pretrial officer?

THE DEFENDANT: Of either of him or yourself. I prefer yourself.

THE COURT: Well—

THE DEFENDANT: First—

THE COURT: —what sort of questions are you talking about?

THE DEFENDANT: Will I acquire the jurisdiction of the Court by filling out any forms whatsoever that he has? I want—

THE COURT: You have a right under the rules to file [18] a motion to dismiss. The court rules say that you must do so within twenty days of today's date. So any attacks on the Court's jurisdiction can be made by motion, and the rules provide that you haven't waived any rights by appearing here today, and being arraigned, and having a not guilty plea entered.

So I see myself—and I cannot give you legal advice, but I cannot see myself that you're waiving anything or causing any adverse effects by talking to the Pretrial officer and furnishing him the information that he needs to recommend to me whether bail should be allowed in this case, and if so, whether a personal bond or some other sort of relief should be imposed.

So if you wish to talk to the Pretrial officer, you may do so.

I guess at this point he would have to do so in the marshall's lock-up.

So at this point, then, Mr. Marshall, you can take custody of the Defendant, and I'll ask the Pretrial officer to meet with the Defendant again, after we take our recess, and to see if you can obtain the information you need to furnish a recommendation. If you obtain that information, I'll hold another hearing later this afternoon and decide what bail should be allowed, if any, in this case, and I have the Government's request for a detention hearing under advisement * * *

[29] THE COURT: Okay?

THE DEFENDANT: Yes, sir. That's all I have, your Honor.

THE COURT: All right. Thank you, Mr. Krzyske. So you're now eligible for release.

THE CLERK: All rise, please.

(Hearing concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATED: August 10, 1985

/s/ LYNN L. SPIETZ, Transcriber

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN ELWOOD KRZYSKE,

Defendant.

Case No. 85-90010
Detroit, Michigan
Monday, May 13, 1985
Judge Joiner

PRETRIAL MOTIONS

BEFORE THE HONORABLE STEVEN PEPE, MAGISTRATE

TRANSCRIPT ORDERED BY: KEVIN E. KRZYSKE (In pro per)

APPEARANCES:

For the Plaintiff:	United States Attorney Office BY: KAREN REYNOLDS 817 U.S. Courthouse Detroit, MI 48226
For the Defendant:	In pro per BY: KEVIN E. KRZYSKE 1705 Monroe Street Carleton, MI 48117
Transcribed by:	Lynn L. Spietz 13810 Courtland Oak Park, MI 48237

* * *

[7] directly to consult with individuals.

THE DEFENDANT: Who are these lawyers licensed by? In other words who—

THE COURT: They're licensed by the state, by any state of the United States, and then they can become a member of the Federal District Court Bar of the Eastern District of Michigan. Most of our attorneys are licensed in the State of Michigan. But that's not a requirement. You can be licensed in the State of Ohio, and still be admitted to the Federal District Court in the Eastern District of Michigan and practice law here.

THE DEFENDANT: I believe I understand the Court's statements, and I guess I understand that if I still stick to my guns so to speak of demanding that I have counsel that's not licensed, you're obviously going to rule against me.

THE COURT: I'm inclined to rule against you, yes, and I've not heard anything to alter—as I say, in preparation of the case you have a First Amendment right to consult with anyone you wish, whether or not the person is licensed, but if you wish the person to come into court and participate in the proceedings, then that person must be a licensed member of the Federal Court Bar.

THE DEFENDANT: Okay. I'd like the record to reflect that I do not waive counsel.

THE COURT: For the record, I will also be clear [8] that if you wish the Court to appoint counsel, and if you are indigent, the Court will appoint you a licensed member of the bar to act on your behalf throughout these proceedings, but as I understand it, you have not sought the Court to appoint you counsel—

THE DEFENDANT: That's correct.

THE COURT: —based upon your inability to afford counsel, correct?

THE DEFENDANT: That's correct. I will by all means—I still am trying to find counsel. If the Court has a list of attorneys that they would like me to contact, I would like to interview some of them, to make sure they're competent for the issues that I feel must be raised. It is absolutely pertinent that they must be raised.

I am very leery of attorneys that would be raising the issues that I feel must be raised, because I feel that they may be sanctioned in some way. These issues are very, very pertinent to my case, and I feel that they have to be raised. This is one of the strong feelings that I have to have.

THE COURT: Okay. Let me ask you, I've not see the Pretrial Services report on you to see whether or not you might be qualified for the appointment of counsel. Do you feel that you are indigent so that you could not afford counsel, or is it just that you cannot find a counsel that you [9] feel will adequately argue the legal positions that you wish to have argued before this Court?

THE DEFENDANT: It's a combination of both, your Honor. I don't feel that I can afford an attorney or counsel, but I have friends that I believe are competent to argue, and that will not charge me, and I feel their knowledge is far superior to an attorney's in regards to the issues that I feel must be raised.

THE COURT: Okay. Again, if you wish to have the Court appoint you counsel, you need to fill out a financial affidavit which requests the Court to appoint you counsel, and also provides the financial background the Court needs to be able to determine whether or nor you can afford counsel. At that point, you could have that attorney talk with any of your friends as well as yourself with respect to your trial and defense theories and strategies, but again, the person that the Court would be appointing would need to be a licensed member of the bench—of the Bar I should say.

THE DEFENDANT: Okay. Just in that regard, I have this one quote from the U.S. Supreme Court, *Bergen v. Texas*. It says:

> "Lack of counsel of choice can be conceivably even worse than no counsel at all, or of having to accept counsel beholding to one's adversary."

I feel that if I have to go to a state licensed [10] bureau or ask the Court to give me counsel, that I'm going to someone that's beholding to my adversary, and this I am very fearful of.

THE COURT: Okay. Well, I mean as I state, if you wish to apply to the Court to appoint counsel, you need to fill out a financial affidavit.

THE DEFENDANT: Okay. I understand that.

THE COURT: And do you wish to do that today or—

THE DEFENDANT: No, I don't.

THE COURT: Okay. If you do that, again, that would be a licensed member of the Bar that the Court would be appointing, although the person would be professionally bound to consult with you and any friends you have with respect to your trial theories and defense strategies. Okay.

MS. REYNOLDS: Your Honor, may I respond to this motion?

THE COURT: Yes, Ms. Reynolds.

MS. REYNOLDS: Obviously I don't disagree with the Court's decision, but I do think there are a couple items that need to be addressed regarding this. Specifically, your Honor, Mr. Krzyske has indicated to the Court, and I believe that he's indicated in his motion also that he feels that he is not competent or feels uncomfortable about representing himself at trial.

Mr. Krzyske should be aware, and I state for the [11] record, that a valid waiver of counsel does not need to be expressed, and he may very well continue to ask the Court for an attorney of his own choosing or for a friend

of his to represent him at trial. However, the Court is within its legal right to have him continue *in pro se* throughout the trial if he should persist in not following the rules of having an attorney who's licensed to practice in front of this Court. So he should be aware of that fact, that even though he may say that he's not waiving his right to counsel, the Court can infer that.

In addition, your Honor, Mr. Krzyske has filed several affidavits with this Court, and those affidavits say that he is, in fact, the person that drafted these motions. Your Honor, he has sworn that that is the case, and so quite probably the Court is bound to accept that. However, I think the Court should be made aware that I have seen several of these motions before, not necessarily word for word. However, they are so similar that I have to believe that they have come from the group that Mr. Krzyske belongs to.

THE DEFENDANT: I object, your Honor.

MS. REYNOLDS: In addition, your Honor—

THE COURT: What is the name of that group, Ms. Reynolds?

MS. REYNOLDS: Well, as I understand it, he is part of a tax protester group, and I believe that it is—

* * *

[17] think, although you may wish to inquire later, that stating that he drafted them necessarily is a false statement and the affidavit is clarified.

MS. REYNOLDS: No, then I think—and I have no problem with the Court accepting the fact that he did write them.

THE COURT: Because attorneys all the time sign pleadings saying that they're the drafters or prepared by, and they've been copied out of a form book, and they don't give attribution, and that's not considered a false statement.

THE DEFENDANT: In this regard, your Honor, I'd also like to ask the U.S. Attorney, Ms. Reynolds, if she prepared all her paperwork and researched all of that—

MS. REYNOLDS: I did, every single word of it I did.

THE COURT: Okay.

MS. REYNOLDS: Unfortunately.

THE DEFENDANT: Okay. Just for the record I'd like to have that stated.

THE COURT: Fine, Mr. Krzyske.

Okay. Just for clarity's sake, I am denying the Defendant's motion for unlicensed counsel or co-counsel of his choice without prejudice to his seeking the Court to appoint a licensed member of the Bar to represent him or his obtaining a licensed member of the Bar to represent him, also.

* * *

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION—ANN ARBOR

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN ELWOOD KRZYSKE,

Defendant.

Criminal Action No. 85-90010-AA
HONORABLE CHARLES W. JOINER

EXCERPTS OF PROCEEDINGS HELD before the HONORABLE CHARLES W. JOINER, U.S. District Judge, at 118 Federal Building, Ann Arbor, Michigan 48107, on Friday, June 14, 1985.

APPEARANCES:

KAREN REYNOLDS, Assistant United States Attorney, Appearing on behalf of Plaintiff,

KEVIN ELWOOD KRZYSKE, In Pro Per.

Brion D. Coury, CSR, CER, CSMR
Certified Shorthand Reporter

[1]

Ann Arbor, Michigan 48107
Friday, June 14, 1985
Morning session

THE COURT: Good morning, ladies and gentlemen. It's nice to see you this moring.

MS. REYNOLDS: Karen Reynolds.

Good morning, Your Honor.

THE COURT: This is the case of the United States against Kevin Krzyske, and Miss Reynolds, you're representing the Government; is that correct?

MS. REYNOLDS: That's correct, Your Honor.

THE COURT: And, Mr. Krzyske, you're representing yourself in this case?

MR. KRZYSKE: Yes, Your Honor, in propria persona.

THE COURT: All right. Fine.

I think we're ready, then. Is the jury ready to be brought in?

MR. KRZYSKE: Your Honor, if I may, I think we have some first administrative procedural matters to attend to.

THE COURT: Just a minute.

All right, before we get to you, I'll just call your attention to—we called what we thought were a [2] sufficient number of jurors, and we have only a large fraction of those number of jurors have shown up, and I don't think there are quite enough yet, so we're going to have to call some more jurors, and we'll be a little late getting them here, but as soon as we get a few more we'll start.

Now, there is one matter that we have to take up before we get the jury here, is that right, Mr. Krzyske?

MR. KRZYSKE: Yes, there's a few, Your Honor.

THE COURT: I can't hear you.

MR. KRZYSKE: Yes, there is a few matters.

THE COURT: All right. Why don't you start out?

MR. KRZYSKE: Okay.

First of all, Your Honor, I am not ready to proceed, and the reasons I'm not ready to proceed is I have no counsel, and I'm here myself. I want the record to reflect that I have been denied counsel by choice. I—

THE COURT: Would you explain that to me, please, so it's on the record as what you mean by that?

MR. KRZYSKE: Well—

THE COURT: Had you employed counsel?

MR. KRZYSKE: Pardon me?

[3] THE COURT: Had you employed counsel?

MR. KRZYSKE: Have I employed counsel?

THE COURT: Yes, yes.

MR. KRZYSKE: At previous times or for this matter?

THE COURT: For this case?

MR. KRZYSKE: For this matter, no, Your Honor.

THE COURT: And did you have an opportunity to employ counsel?

MR. KRZYSKE: I have had opportunity to seek counsel, and I have sought counsel. I've traveled many hundreds of miles, Your Honor, to seek the advice of what I considered the best attorneys in the country.

THE COURT: And did you—did you—are you indigent, is that why you—

MR. KRZYSKE: I cannot afford an attorney at this time, Your Honor.

THE COURT: Well, did you file an affidavit of indigency?

MR. KRZYSKE: No, I did not, Your Honor.

THE COURT: And we've been through this once before in connection with this. This is the same question we went through before. You want somebody who is not a lawyer to help you; is that correct?

MR. KRZYSKE: Well, primarily, yes.

[4] Of course, it's up to the Court to grant me that. I understand according to what the magistrate mentioned to me before, and I understand the Court's wishes concerning that.

If they do not grant me a non-licensed attorney, that is, non-licensed by the Bar of Michigan, then I will consider at this time the appointment of a competent court-appointed attorney.

THE COURT: I did deny you that some time ago; is that right?

MR. KRZYSKE: You denied me?

THE COURT: Yes. I mean I denied you the right to have a non-licensed lawyer with you.

MR. KRZYSKE: Yes.

THE COURT: And the magistrate did the same thing, didn't he?

MR. KRZYSKE: Yes.

THE COURT: All right.

Now, what are you telling me now?

MR. KRZYSKE: I'm telling you that I do not waive my right to counsel. I feel it is—

THE COURT: I understand you don't—by getting a ruling you don't waive your right; that's correct.

I rule against you that you can have a [5] licensed—a non-licensed attorney though.

MR. KRZYSKE: I understand.

THE COURT: Okay; but the person that you want is not a licensed attorney anyplace; isn't that right?

MR. KRZYSKE: That is correct, Your Honor.

THE COURT: I didn't think we had an Ohio lawyer that wanted to come up here at this point.

That's not what's involved, is it?

MR. KRZYSKE: Correct.

THE COURT: All right. Fine.

What's the next question?

MR. KRZYSKE: Well, first of all, am I not going to be able to proceed with counsel then or—

THE COURT: I have—you have had an opportunity to have counsel. You have been told at an earlier time that you could not have a licensed lawyer—an unlicensed lawyer. We are here now to proceed with trial with a jury here to go forward, and we're prepared to go forward. We shall go forward.

MS. REYNOLDS: Your Honor, I don't know if I misunderstood Mr. Krzyske, but I believe the record needs to be especially clear in this regard. It's my understanding that he just asked the Court for a court-appointed attorney.

[6] THE COURT: He says he's not filed an affidavit of indigency in any way—

MS. REYNOLDS: Correct, but—

THE COURT: —and I do not appoint attorneys unless I believe them to have an economic for lawyers at that point—

MS. REYNOLDS: —exactly, I just—

THE COURT: —or indicated by that.

MS. REYNOLDS: He has never requested a court-appointed attorney before.

THE COURT: Yes, I understand that.

MR. KRZYSKE: Is it my knowledge, Your Honor, correct that stating I have to file some court papers first and waive my right to privacy under those conditions to file the papers—

THE COURT: You have, you have—

MR. KRZYSKE: —to obtain another right of counsel?

THE COURT: There is certain information including information about your capital and your income that is required to be shown before I—we will spend public money to appoint a counsel for you. That's correct.

MR. KRZYSKE: I guess I must be mistaken, Your Honor. I thought there were Supreme Court cases [7] stated that it is improper for one right to be waived to obtain another right.

In my view, Your Honor, this is within that scope. I would have to have a competent attorney to advise me as far as what I should write on those forms, Your Honor. If I do not, I would be waiving some rights on the way to obtaining counsel.

THE COURT: Yeah. The ruling is that you have to prepare and file the affidavit of indigency before you get counsel.

Now, let's proceed with the next matter.

MR. KRZYSKE: The U.S. Attorney has stated, I believe it was at that May 13 motion hearing, that I was to receive all the jury disclosure information that she had had that was supposed to be given to her by the disclosure officer, Internal Revenue Service disclosure officer.

THE COURT: What kind of information?

MR. KRZYSKE: What kind of information?

THE COURT: Well, what are you talking about? I didn't hear. What kind of disclosure?

MR. KRZYSKE: Disclosure officer of the Internal Revenue Service, Your Honor, is required to submit to the U.S. Attorney the information regarding the perspective jurors in tax proceedings.

FILED
OCT 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-352

In the Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN ELWOOD KRZYSKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

ROGER M. OLSEN
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
DONALD W. SEARLES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court could require petitioner, who was convicted of federal tax evasion and failure to file federal tax returns, to file proper income tax returns and to pay back taxes as conditions of release pending appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-352

KEVIN ELWOOD KRZYSKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals partially denying petitioner's motion to eliminate certain conditions of release (Pet. App. A3-A5) is unreported. The order of the court of appeals clarifying its original order and denying petitioner's motion to stay or reverse the district court's order to comply with the release conditions (Pet. App. A8-A9) is also unreported.

JURISDICTION

The original order of the court of appeals was entered on May 1, 1986. The subsequent order of the court of appeals was entered on June 13, 1986. The petition for a writ of certiorari was filed on August 13, 1986, and is therefore out of time under Rule 20.1 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of willfully attempting to evade in-

come taxes for the year 1978, in violation of 26 U.S.C. 7201, and four counts of willfully failing to file income tax returns for the years 1979 through 1982, in violation of 26 U.S.C. 7203 (Pet. App. A3). Petitioner was sentenced to five years' imprisonment and a $10,000 fine on the tax evasion count; on each of the counts charging him with failing to file tax returns, petitioner was sentenced to one year's imprisonment and fined $10,000 (*ibid.*).[1] Petitioner challenges his detention pending appeal.

1. After his conviction, petitioner moved for bail pending appeal pursuant to Section 3143(b) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3143(b).[2] The district court found "nothing meritorious in [petitioner's] appeal" (Pet. App. A1), but nevertheless assumed in its findings, "based on [petitioner's counsel's] assertion alone" (*ibid.*), that petitioner's appeal presented substantial questions of law. The court found, however, that the safety of the community "could be affected" if petitioner continued to violate the tax laws and to espouse his views of the income tax system, possibly causing other individuals to face prosecution for similar tax offenses (*id.* at A1-A2). The court therefore granted petitioner's motion, subject to three conditions. Petitioner was to (1) communicate only with his counsel regarding his tax beliefs during the pendency of his appeal; (2) file proper tax returns within ten days of the district court's order for the period 1978 through 1984; and (3) pay past due taxes when he filed the tax returns (*id.* at A2).

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[1] The sentences for failing to file income tax returns are to run consecutively to each other and concurrently with the term imposed for the tax evasion conviction (*ibid.*).

[2] That Section authorizes bail pending appeal if the district court finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and that "the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial" (18 U.S.C. (Supp. II) 3143(b)(1) and (2)).

Both petitioner and the government appealed from the district court's ruling. Petitioner contended that the conditions were improper. The government argued that the district court erred in releasing petitioner because, among other reasons, petitioner's appeal on the merits did not raise a substantial question. See 18 U.S.C. (Supp. II) 3143(b)(2). The court of appeals, addressing only the conditions of release, affirmed in part and reversed in part (Pet. App. A3-A5). The court eliminated the first release condition as a prior restraint on speech under *Near* v. *Minnesota,* 283 U.S. 697 (1931), but it denied petitioner's motion to eliminate the conditions requiring petitioner to file proper returns and to pay back taxes (Pet. App. A4-A5). The court of appeals also granted petitioner's motion to continue bond (*ibid.*). Finally, the court referred the government's motion to revoke bond to the panel that would hear petitioner's appeal on the merits (*ibid.*).[3]

2. Following the court of appeals' decision, the district court instructed petitioner that his opportunity to comply with the release conditions would expire on June 15, 1986 (Pet. App. A6-A7). Petitioner appealed once again, and the court of appeals denied his motion to stay or reverse the district court's order (*id.* at A9). In addition, the court of appeals clarified its earlier ruling by adding the following language: "It is ordered that defendant's motion for continuation of bond pending appeal is granted provided that he files tax returns for 1978-84 within the time required by the district court and provided that all past due taxes are paid by the defendant at the time the returns are filed" (*ibid.*).

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[3] The court of appeals panel did not rule on the government's motion during the period that the district court's conditional release order remained in force. As we explain, page 4, *infra,* the district court entered a subsequent order requiring petitioner's unconditional detention. Petitioner's appeal on the merits remains pending.

On June 25, 1986, petitioner applied to this Court for an emergency stay of the court of appeals' decision pending the filing of a petition for a writ of certiorari. Justice O'Connor denied that request, (No. A-1005 (June 27, 1986)). Petitioner then requested, once again, that the district court modify its conditional release order. The government objected, noting that the time for compliance with the release conditions had lapsed and that the court was free to issue a new order denying petitioner bail pending appeal (July 10, 1986 Tr. 12-13). The court agreed with the government's assessment (*id.* at 18) and entered an order finding that petitioner "does not raise any meritorious issues on appeal," that he "pose[s] a danger to the community if he is released," and that he had failed to comply with the court's previous conditions for bail pending appeal (Pet. App. A10). The court accordingly denied petitioner bail pending appeal (*id.* at A11).

ARGUMENT

The Bail Reform Act of 1984 imposes strict limitations on the release of convicted defendants pending appeal. In order to qualify for bail pending appeal, a defendant must demonstrate by clear and convincing evidence that he is not likely to flee and that he does not pose a danger to the community. See 18 U.S.C. (Supp. II) 3143(b)(1). In addition, the defendant must establish that his appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial" (18 U.S.C. (Supp. II) 3143(b)(2)). Petitioner challenges the application of those provisions in this case.

1. Petitioner specifically challenges the district court's imposition of conditions upon his release. He contends that the district court's conditions, requiring him to file proper tax returns and pay back taxes, are improper for a number of reasons. That issue, however, is not properly before this Court. The record shows that the district court

order imposing the release conditions is no longer in force and that petitioner's challenges are now moot. It is true that the district court initially authorized conditional release (Pet. App. A1-A2) and the court of appeals partially affirmed the conditions imposed by the district court (*id.* at A10-A11). But petitioner failed to comply with those conditions within the district court's prescribed time limit and failed to obtain a stay of the district court's order. The court then entered a new order requiring petitioner, unconditionally, to remain in custody (*ibid.*). In short, the district court's order imposing the conditions that petitioner finds objectionable has now expired. The release conditions no longer exist. Accordingly, there is no basis for further review of those conditions.

2. The only question presented by the detention issue in its current posture is whether the district court properly ordered petitioner unconditionally detained. Under the Bail Reform Act of 1984, the district court's finding that petitioner's appeal does not raise a substantial issue (Pet. App. A10) provides a sufficient ground for his continued detention. See 18 U.S.C. (Supp. II) 3143(b)(2). Petitioner has not sought review of that determination from the court of appeals.[4] Thus, any challenge to petitioner's unconditional detention, ordered by the district court on July 10, 1986, is not properly before this Court.

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[4] The district court stated in its original order that it could see nothing meritorious in petitioner's appeal, but it nevertheless assumed in its findings, based solely on the professed beliefs of defense counsel, that the appeal raises "substantial questions of law" (Pet. App. A1). Petitioner contends that "[t]he circuit court upheld the district court's equivocal finding of a substantial issue based upon unspecified arguments of counsel" (Pet. 14). That contention is clearly incorrect. The government challenged the court's apparent finding that petitioner's appeal raises substantial issues. The court of appeals' opinion did not address the issue; instead, it referred the government's challenge to "the panel that will hear the case on the merits" (Pet. App. A5). That panel failed to rule on the issue while the conditional release order remained in force.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER TERM, 1986

KEVIN ELWOOD KRZYSKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-352

Kevin Elwood Krzyske, Petitioner

v.

United States of America

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Sixth Circuit

RESPONSE TO THE GOVERNMENT'S BRIEF IN OPPOSITION

I. This matter properly is before the Court.

A. CASE AND CONTROVERSY

This petition for certiorari presents the unsettled question of what unspecified conditions are proper regarding release pending appeal under the Bail Reform Act of 1984. This is a real controversy.

As the record shows, petitioner initially was granted release pending appeal. Certain novel conditions, however, were imposed by the District Court. The first condition prohibited the defendant from discussing certain matters with anyone but his attorney. This condition was found to be an unconstitutional prior restraint by the Court of Appeals for the Sixth Circuit. The conditions directing petitioner 1) to file certain tax returns and 2) to pay any and all tax due thereon were affirmed. The petitioner did not comply by the expiration of the period established by the order of the Court of Appeals. In fact, the petitioner stated in open court that he could not comply with the conditions as they related to payment of any and all taxes due. The

District Court subsequently entered an order requiring petitioner to be detained unconditionally. Petitioner motioned for stay of such conditions before the District Court. That motion was denied. Petitioner voluntarily submitted to custody and remains incarcerated presently.

The District Court explicitly and implicitly found that the petitioner was not likely to flee and did not pose a danger to the community when the court granted release pending appeal of petitioner's conviction. This order was burdened only by the three conditions, one of which was found to be unconstitutional. If the other conditions were improper, then petitioner was entitled to bail and the petitioner's challenges are not moot.

II. The Conditions Imposed Upon Release were Improper ab initio.

A. ISSUE

At the heart of this petition are the issues of 1) whether the District Court Order establishing specific novel conditions to release pending appeal was proper, and 2) whether the petitioner's noncompliance with those conditions properly were used as the court's basis for ordering unconditional detention.

B. THE PETITIONER'S EIGHTH AMENDMENT RIGHT AGAINST EXCESSIVE BAIL

The Eighth Amendment prohibits excessive bail and it has been applied to matters where a defendant has been found entitled to bail. See United States v. Giangrasso, 763 F.2d 849 (7th Cir. 1985). The District Court clearly found that

petitioner 1) was entitled to release pending appeal; 2) was not therefore a danger to the community; and 3) was not likely to flee the jurisdiction.

How then do the requirements that petitioner file tax returns and pay any and all tax due thereon further the ends of the Bail Reform Act? In light of the fact that petitioner could not comply with both conditions, that the district court was apprised of the circumstances and that such conditions were not reasonably related to the ends of conditional release, the order was improperly excessive and violative of petitioner's Eighth Amendment right to reasonable bail.

C. THE BAIL REFORM ACT OF 1984 AND ITS LIMITATIONS UPON THE DISTRICT COURT

The District Court subsequently imposed conditions to release pending appeal not contemplated by the Bail Reform Act. A defendant, once found to be entitled to release by the court, can be subjected to any conditions to release that are related reasonably to 1) the likelihood of flight and 2) the safety of the community. The initial order of the District Court promotes neither end as petitioner was found not to present a threat to the safety of the community and not likely to flee the jurisdiction. The subsequent order for unconditional detention therefore was tainted by the improper conditions set in the former order.

Further, petitioner notes that even assuming arguendo, as the brief in opposition contends, that sufficient ground for unconditional detention exists, no such findings by the District Court in support of such detention were ever made. On the contrary, petitioner was found to be entitled to release pending appeal. With regard to such a finding petitioner has a due process right to require any novel conditions to said release to be related reasonably to the purposes of the Bail Reform Act. These substantive issues properly are raised before this Court.

III. Conclusion.

The issues presented to this Court are actual controversies not settled and for which petitioner is entitled to

relief. The brief in opposition clearly attempts to avoid the merits of the issue relating to the scope of the reasonable conditions authorized by the Bail Reform Act of 1984. The brief in opposition fails to cite any decisions in support of its argument. This can be attributable in part to the fact that the status of the law regarding the Bail Reform Act of 1984 is uncertain.

The District Court's orders should be reversed as neither the order establishing conditions of release nor the order establishing detention are founded upon law or fact. The petition for certiorari therefore should be granted.

Respectfully submitted,

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